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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

SCOTT LYNN CHRISTENSON

Petitioner,

—v.—

TONY TURPIN, Warden
Georgia Diagnostic and Classification Center,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Petitioner, Scott Lynn Christenson, respectfully submits this reply brief in support of his petition for a writ of certiorari (the "Petition") to review the judgment of the Supreme Court of the State of Georgia, entered by the Butts County Superior Court on April 28, 1998.

I.

THE PETITION RAISES A FUNDAMENTAL QUESTION OF LAW OF PARAMOUNT IMPORTANCE FOR THIS COURT'S REVIEW.

Contrary to the contentions in respondent's brief in opposition to the Petition, the Petition raises a fundamental question of law of paramount importance for this Court to decide: Whether the knowing assertion of a baseless defense that could only mystify, and, in the description of trial observers, "shock and anger" the jury, constitutes ineffectiveness of counsel that is so prejudicial as to undermine any confidence in the fundamental fairness and outcome

of the trial. *See Wade* v. *Calderon*, 29 F.3d 1312, 1325 (9th Cir. 1994) (granting *habeas corpus* relief because, *inter alia*, counsel's defense theory was "presented in a manner that clearly risked alienating the jury"), *cert. denied*, 513 U.S. 1120 (1995); *Young* v. *Zant*, 677 F.2d 792,798 (11th Cir. 1992) (granting *habeas corpus* relief because "competent counsel would not have gone to trial on an insanity defense without evidence to support it"); *House* v. *Balkcom*, 725 F.2d 608, 618 (11th Cir. 1984). Respondent mischaracterizes the matters at issue here in asserting that the Petition asks this Court to review the factual findings of the habeas court or the Georgia Supreme Court. To the contrary, the Petition asks this Court to address an important constitutional issue about what it means to have a trial that affords a defendant the "fundamental fairness essential to the very concept of justice." *Lisenba* v. *California*, 314 U.S. 219, 236 (1941).

The operative facts were found by the habeas court and, contrary to respondent's assertions, are not challenged here. Specifically, the habeas court found, "based on the trial record and the testimony at the habeas corpus hearing," (A39) that Mr. Christenson's counsel had no basis to represent to the jury that the defense would prove that "Oliver was killed when Christenson attempted to trade guns for drugs and Oliver made a sexual advance to him." (A71). The Georgia Supreme Court sustained the habeas courts' findings, concluding in relevant part: "In his opening statement, Mr. Kirby told the jury that the defense would show that Mr. Oliver, the victim, had been a drug dealing homosexual who had initiated the events which led to his death by attempting to trade sex for drugs. As the trial progressed, it became apparent that trial counsel had virtually no evidence to support this characterization of the victim." (A9).

Under the approach articulated in *Strickland* v. *Washington*, 466 U.S. 668, 687 (1984), this Court applies a two-pronged test to determine whether the performance of counsel is so deficient as to abridge a defendant's Sixth Amendment rights. As detailed in the Petition, Mr. Christenson has satisfied both prongs of that test with respect to *both* the death sentence *and* his murder conviction. Mr. Christenson's court-appointed defense counsel, William Kirby and Richard Bunn, alienated the jury from the outset of trial by

making representations to the jury that they knew to be both baseless and defamatory to Mr. Christenson and the victim. Trial counsel's performance was, therefore, deficient and prejudicial within the meaning of *Strickland*, and Mr. Christenson's conviction should be vacated.

Respondent erroneously asserts — as did the courts below — that Mr. Christenson's murder conviction must stand notwithstanding this farcical defense because the evidence of his guilt was "overwhelming." (Brief in Opposition on Behalf of Respondent at 7 (quoting *Turpin v. Christenson,* 269 Ga. 226, 233, 497 S.E.2d 216, 223 (1998)).) Although the prosecution was permitted to introduce at trial several inculpatory statements that Mr. Christenson had made while in custody, those statements demonstrated only that Mr. Christenson had admitted to having shot Mr. Oliver in the course of a struggle. The issue for the jury — the very jury that had been alienated by defense counsel's fabrications and prejudicial depictions of Mr. Christenson on an extended videotape — was not simply whether Mr. Christenson had shot Mr. Oliver, but whether the conduct Mr. Christenson described constituted capital murder.* Had they not been poisoned by the constitutional deprivations and the other deficiencies found by the *habeas* court, there is a reasonable probability that the jury would have decided not to convict Mr. Christenson of murder.

Indeed, reduced to its essence, respondent's argument would eviscerate not only the fundamental right to a *fair* trial, but the right to *any* trial in a criminal case. Under respondent's reasoning, a defendant who had admitted to some involvement in the death of the victim would suffer no prejudice even if he were adjudged guilty of murder without any trial at all. Such an absurd result plainly is not the law.

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* Indeed, defense counsel had requested, but — in part, because of their deficiencies of preparation and presentation — failed to obtain, a jury instruction as to the lesser included offense of voluntary manslaughter.

Moreover, respondent's position would both deprive Mr. Christenson of the constitutional presumption of innocence and undermine the requirement that the prosecution prove all elements of its charges beyond a reasonable doubt. Proof that Mr. Christenson was involved in Mr. Oliver's death does not establish that Mr. Christenson committed murder. Such a determination may be made only by the jury — an impartial, untainted jury — after finding that the prosecution had proved all of the elements of that crime beyond a reasonable doubt, including establishing that the defendant had acted "unlawfully and with malice aforethought." Ga. Code Ann. § 16-5-1(a). Defense counsel's prevarications and other deficiencies prejudiced the jury against Mr. Christenson from the outset of, and throughout, the trial; and made such a dispassionate determination impossible.

Moreover, the adequacy of Mr. Christenson's representation, just as the fairness of Mr. Christenson's capital proceedings, should also be reviewed as a whole, rather than merely examined in isolation with respect to each "phase" of the trial. The Superior Court found, and the Georgia Supreme Court affirmed, that Mr. Christenson's trial counsel were deficient during all "phases" and aspects of Mr. Christenson's trial, from pre-trial preparation, through the trial as to guilt or innocence, and during the sentencing proceedings. (A8-A21; A66-A76) The cumulative impact of that pervasive ineffectiveness deprived Mr. Christenson of his constitutional right to a fair trial. *See Lundy* v. *Campbell*, 888 F.2d 467, 472-73 (6th Cir. 1989); *Cooper* v. *Sowders*, 837 F.2d 284, 288 (6th Cir. 1988); *Walker* v. *Engle*, 703 F.2d 959, 968 (6th Cir.1983); *cf. Derdon* v. *McNeel*, 978 F.2d 1453, 1455-58 (5th Cir. 1992) (adopting the majority rule on cumulative error with certain limitations); *United States* v. *Rivera*, 900 F.2d 1462, 1477 (9th Cir. 1990) (concluding after a review of the record that there was no cumulative error such that defendant was denied his right to a fundamentally fair trial).

The cumulative effect of the errors by Mr. Christenson's trial counsel, including the failure to request a curative instruction for the introduction of a videotape showing Mr. Christenson in shackles and jail attire, was so "prejudicial to [Mr. Christenson] that reversal is warranted." *United States* v. *Wallace*, 848 F.2d 1464, 1478 (9th

Cir. 1988). As this Court has admonished, "denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice." *Lisenba*, 314 U.S. at 236. The record here establishes that Mr. Christenson did not receive his constitutional right to a fair trial.

CONCLUSION

For the foregoing reasons, and those stated in the Petition, the Court should grant certiorari and reverse the decision of the Supreme Court of Georgia with respect to the questions presented in the Petition.

Respectfully submitted,

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